Supreme Court, U.S.
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No. 93-1107

In The

Supreme Court of the United States

October Term, 1993

JAMES RICKY JONES
and VERA JONES,

Petitioners,

v.

CITY OF CARLISLE,
KENTUCKY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause places an affirmative duty on the state[1] to protect the liberty of its citizens against invasion by private actors where no evidence exists that the state itself restrained the citizen's liberty and/or played any role in creating the danger.

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[1] "State" means municipal police department for purposes of this Petition.

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STATEMENT OF THE CASE

The Petitioners' Statement of the Case omits key facts which support the legal grounds upon which the Sixth Circuit based its decision.

Defendant, Mark Byrd, obtained his driver's license from the state, via the circuit clerk in 1983. (See Petitioners' Appendix C, p. 52a). Since that time he has been involved in various motor vehicle accidents, the majority of which occurred in the Respondent, City of Carlisle. (See Petitioners' Appendix C, pp. 54a-56a). Several of these accidents were caused by his epileptic disorder. A few were reported to the City of Carlisle and several were attended to by the City of Carlisle. (See Petitioners' Appendix C, pp. 54a-55a). The last accident or epileptic incident to occur on the roadways of Carlisle, Kentucky, prior to Petitioner's 1990 accident was 1987. (See Petitioners' Appendix C, p. 55a).

On November 13, 1990 Mark Byrd was involved in a seizure related accident in which he struck the Petitioner, James Ricky Jones's motor vehicle head on, resulting in injury to the Petitioner. (See Petitioners' Appendix C, p. 56a).

According to the Petitioners' theory, several statutes in Kentucky require the Respondent, Carlisle police department officials, to file accident reports for all accidents with the state police and to issue citations for all violations of traffic laws. While the Respondent did not agree with such an overly broad interpretation of the statutory duties imposed by Kentucky Revised Statutes (KRS) 431.450 and 189.635, for the purposes of the Rule 12(b)(6) motion filed before the district court and the

appeal taken by Petitioners to the Sixth Circuit, these facts were taken as true.

Simply put, Petitioners asserted that by failing to file accident reports of each and every accident involving Mark Byrd, as well as to issue citations against Byrd for driving and having an epileptic seizure, the Respondent deprived the Petitioner of his constitutional rights, specifically the Fourteenth Amendment right to substantive due process. The Petitioners also asserted pendent state claims against the Respondent for negligence, loss of consortium and punitive damages. (See Petitioners' Appendix C, pp. 59a-60a).

The district court relying on precedent of this Court, granted Respondent's Rule 12(b)(6) motion. (See Petitioners' Appendix A, pp. 15a-29a). In this Opinion and Order, the district court also overruled Petitioners' earlier Motion to Amend to assert Fifth and Fourteenth Amendment violations. (See Petitioners' Appendix A, p. 16a, n. 2). Petitioners then moved the district court to alter, amend or vacate the Opinion and Order. Simultaneously, Petitioners moved to amend their complaint a second time. The district court overruled both motions. (See Petitioners' Appendix A, pp. 31a-33a).

Petitioners then appealed to the Sixth Circuit, which after briefing and oral argument, affirmed the result of the district court, on *de novo* review. (See Petitioners' Appendix A, pp. 3a-14a). On Petition for Rehearing En Banc the Sixth Circuit denied the Petition. (See Petitioners' Appendix A, pp. 35a-36a).

In addition, it should be specifically noted that although Petitioners' Statement of the Case paraphrases

deposition testimony of Ronald Clark, Ronald McDonald, Darryl McFarland, Valerie Taylor, Mark Byrd, Roy Fryman and Frank Hughes, such testimony was specifically not examined by the lower courts and should not be considered part of the record on appeal. (See Petitioners' Appendix A, p. 5a, n.2). Moreover, all of these depositions, with the exception of Valerie Taylor, were taken in Petitioners' parallel state cause of action, not in this federal action.

Finally, while the entire text of each decision is set forth in the Appendix for full examination by this Court, the Petitioners rely on their own interpretations of the district court and Sixth Circuit decisions to summarize these rulings. (See Petition for Writ of Certiorari, pp. 6-7). Moreover, contrary to Petitioners' interpretations, the Sixth Circuit's review of the district court Opinion and Order was a *de novo* review. *American Eagle Credit Corp. v. Gaskin*, 920 F.2d 352 (6th Cir. 1990). Similarly, this Court reviews appellate court "judgments," not written opinions. *Bowen v. American Hosp. Ass'n.*, 476 U.S. 610 (1986). Thus, the specific wording of the district court Opinion and Order is not relevant to the issue on review.

ARGUMENT

By requesting that their Petition be granted, Petitioners desire to revisit matters this Court previously has addressed at length. Moreover, the interpretations of these issues by the Circuit Courts of Appeal are in accord. Although disguised by rhetoric, the Petitioners' sole purpose in seeking Writ of Certiorari is to ultimately obtain

reversal of this Court's earlier decision in *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189 (1989). (Petition for Writ of Certiorari, pp. 12-14.) There is no conflict between the Sixth Circuit's decision in the instant case and *DeShaney*; nor is there any true conflict among the circuits on the application of *DeShaney*. Accordingly, the Petition should be denied.

I. THE SIXTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides that petitions for writ of certiorari will be granted "only when there are *special* and *important* reasons therefor." S.Ct.R.10(a). While one such stated reason is where a United States Court of Appeals has decided an important question of federal law in a way that conflicts with applicable decisions of this Court, it is well established that mere assertion of conflict with Supreme Court precedent will not suffice. S.Ct.R.10(a)(c).

Accordingly, Petitioners' assertions that the Sixth Circuit decision in the instant case is in conflict with this Court's ruling in *DeShaney* are insufficient. 489 U.S. 189. There must indeed *be* a conflict between the two holdings. A careful reading of *DeShaney* and its application by the Sixth Circuit reveals there is no conflict.

In *DeShaney*, this Court examined an issue that had troubled the lower courts for several years: when, if ever, does the failure of a government official to provide an individual with adequate protective services constitute a violation of the individual's due process rights? *Id.* at 194.

Joshua DeShaney was beaten and permanently injured by his father with whom he resided. DeShaney asserted that local social workers and other government officials had received complaints that he was being abused, but did not act. DeShaney filed suit claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause. Specifically, DeShaney argued that his relationship with the government officials, *i.e.*, their knowledge of his plight, and their intentions to provide assistance had set him apart from the general public, thus causing the state to acquire an affirmative duty to act, which duty the state then breached.

As a cornerstone to its decision, this Court set forth the following general rule:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression,". . . . Its purpose was to protect the people from the State, not to

> insure that the State protected them from each other.

Id. at 195-196 (citations omitted).

Expanding upon the above principles, this Court then noted its previous development of the general rule:

> [t]hat the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid maybe necessary to secure liberty, life, or property interests of which the government itself may not deprive the individual . . . . As we said in *Harris v. McRae*, "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted *governmental* interference . . . it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be liable under the clause for injuries that could have been averted had it chosen to provide them. *As a general matter, then, we conclude that a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."*

Id. at 196-197, (citations omitted) (footnote omitted) (emphasis original and added) (quoting *Harris v. McRae*, 448 U.S. 297, 317-318 (1980)).

Having set down these general rules and observations about the Due Process Clause, this Court in addressing DeShaney's argument that the state knew he faced a special danger, fashioned the following "exception" to the general rule:

> [W]hen the State by the affirmative exercise of its power *so restrains an individual's liberty* that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs e.g. food, clothing, shelter, medical care, and *reasonable safety* it transgresses the substantive limits on state action by the Eighth Amendment and the Due Process Clause.

Id. at 200 (emphasis added). Thus, the affirmative duty to act was found, not to emanate from the state's knowledge of the victim's plight or from its promises to help, but rather from the "limitation which it has imposed on his freedom to act on his own behalf." *Id.*

Intending merely to provide instructional examples on this rule by drawing on precedent, this Court then opined:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf through incarceration, institutionalization, *or other similar restraint of personal liberty* which is the "deprivation of liberty" triggering the protection of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. (emphasis added) (footnote omitted). Hence, the first lesson of *DeShaney* is that generally the state has no affirmative duty to act to protect an individual from outside harms, unless the state has interfered or impinged upon the individual's liberty to protect himself.

Further, this Court went on to note that while Joshua DeShaney acknowledged that the state in *his situation* had not "created his danger," the actual creation of danger by

the state, such as placing an individual in a more vulnerable position, could then place a duty on the state to protect the individual from the danger created. *Id.* at 201-202. The genesis of this theory of potential duty appears to lie in the Court's opinion that where an individual's ability to protect himself, *i.e.*, liberty, is "restrained" by the state's actions, there is a "deprivation of liberty" triggering the protections of the Due Process Clause.

Accordingly, *DeShaney* did not, as Petitioners argue, overrule the "special relationship" theory of liability, nor did *DeShaney* stand for merely one theory of liability. Rather *DeShaney* 1) reaffirmed the purpose of the Due Process Clause; 2) set down the general rule of non-liability for failure to protect an individual from outside forces; 3) established the exception to this rule – that where a state actor so restrains an individual to render him vulnerable to outside forces, a "deprivation of liberty" occurs (generally found in, but *not* limited to, "custodial" relationships); and 4) acknowledged that deprivation of liberty may also occur where the state creates the danger.

Further Petitioners are arguing over semantics in asserting that *DeShaney* did away with the "special relationship" test. Rather, *DeShaney* merely rejected one type of "special relationship" analysis (state knew victim faced a special danger) for another (circumstances where state restrains victim's freedom thus rendering him more vulnerable). Indeed many courts in specifically adhering to *DeShaney*, refer to a "special relationship custody" analysis. *See, e.g., Germany v. Yance*, 868 F.2d 9, 23 (1st Cir. 1989); *D.R. v. Middle Bucks Area Voc Tech*, 972 F.2d 1364,

1368 (3rd Cir. 1992), *cert. denied* 113 S.Ct. 1045 (1993); *Griffith v. Johnston*, 889 F.2d 1427, 1439 (5th Cir. 1990).

Turning now to a review of the Sixth Circuit's decision in the instant case it is clear that that decision is not in conflict with the rules of *DeShaney*.

First, the Sixth Circuit, directly quoting this Court, cited the cornerstone of *DeShaney* that while no state is permitted to deprive any person of life, liberty or property without due process, such does not serve to protect a citizen's life, liberty or property from a private actor's invasions; the Due Process Clause is a limitation on state's power to act, not a guarantee of certain minimal levels of safety and security. (See Petitioners' Appendix A, p. 7a). This is certainly not in conflict with this Court's decision in *DeShaney*.

Second, the court in relying on *DeShaney* found that because no relationship existed between Byrd, the tort feasor, and the city or between the city and Mr. Jones, "circumstances" did not exist to create an affirmative duty of care and protection. (See Petitioners' Appendix A, p. 10a and n.4).

Third, the court addressed Petitioners' argument that the City of Carlisle "caused" the Petitioner's injuries and noted that Byrd, the epileptic driver, not the City, caused the injuries. (See Petitioners' Appendix A, p. 11a). Again, such a ruling was not only supported by the undisputed facts of the case at bar, but was also consistent with this Court's opinions in *DeShaney*, and *Canton v. Harris*, 489 U.S. 378 (1989). *DeShaney* stands for the proposition that liability may exist where the state created the danger; *Harris* espouses that a state could be liable if its policy or

custom was the "moving force" behind the constitutional violation. 489 U.S. at 201; 489 U.S. at 389.

Fourth, the Sixth Circuit examined Petitioners' claim that he was "entitled to protection" and relying on *DeShaney*, affirmed the dismissal of this claim as nothing more than a failure to protect claim. (See Petitioners' Appendix A, p. 12a). This is consistent with this Court's ruling that "the Due Process Clause . . . does not confer an *entitlement* to such [governmental aid]." 489 U.S. at 196.

Fifth, the court of appeals, citing yet another cornerstone of *DeShaney*, ruled that it would not extend the Due Process Clause to cover common law tort actions between private citizens. 489 U.S. 202 (See Petitioners' Appendix A, p. 12a).

In summary, a careful comparison of this Court's ruling in *DeShaney* and the Court of Appeals' decision in the instant case clearly evidenced that the Sixth Circuit's decision was consistent in result and legal opinion, rather than in conflict. Accordingly, it would be a waste of judicial economy to grant Petitioners' request, as the result would remain the same.

Furthermore, Petitioners also argue that there is no place for a "special relationship" analysis in Section 1983 liability. Rather, Petitioners assert that where a governmental entity refuses to enforce the laws of that state, such an abuse rises to the level of a constitutional tort. Essentially, the Petitioners desire that this Court supplant the Due Process Clause and the duties it creates with traditional tort law duties. However, this Court has previously spoken at length on this issue and has ruled

emphatically that where the victim is injured by a third party or outside force, and not a state actor, there can be no constitutional liability unless 1) the State has affirmatively restrained the individual's liberty, thus rendering him more vulnerable, or 2) the State by its affirmative acts created the danger. 489 U.S. 189. Moreover, this Court has spoken on numerous occasions regarding the place for tort law in such a constitutional analysis stating, "we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort." *Collins v. City of Harker Heights, Lex.*, 112 U.S. 1061, 1070 (1992).

It is clear that in arguing that the Sixth Circuit is in conflict with Supreme Court precedent, the Petitioners merely seek to revisit and *expand* upon the rules established in *DeShaney*. However, this Court has stated:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. It is important, therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what the city allegedly did to deprive [him] of that right.

Id. at 1068.

In closing, it is noted that the Sixth Circuit's decision in the instant case is also consistent in result with this

Court's pre-*DeShaney* decision of *Martinez v. California*, 444 U.S. 277 (1980) in which this Court held that state officials were not liable when a parolee murdered a 15 year old girl. Petitioners have implied that *Martinez* has been overruled by the *DeShaney* decision, in that this Court stated, "we reject this argument," in response to Joshua DeShaney's argument that a "special relationship" existed between Joshua and the state because the state knew that Joshua faced a special danger of abuse at the hands of his father. 489 U.S. at 189.

Respondent respectfully submits that not only did *DeShaney* not overrule this Court's earlier decision in *Martinez*, but as this Court noted in *DeShaney*, *Martinez* was decided on the much narrower ground of "causal connection between the state's acts and the murder." 489 U.S. at 197, n.4. There is no language in *DeShaney* to indicate that the *Martinez* ruling, *i.e.*, that the release of the parolee was too attenuated to establish a deprivation of constitutional rights, has been overruled.

Accordingly, given the facts in the instant case, it is clear that the result reached by the Sixth Circuit in this case is fully supported by not only *DeShaney*, but *Martinez*. As the facts cited in the Petitioners' own complaint indicate, the last contact that the Respondent had with the epileptic driver, Mark Byrd, was in 1987, some *three years* prior to the accident between Petitioner and Byrd. Such an accident in 1990 is too remote a consequence of the Respondent's actions or inactions in 1987 to hold them liable under Section 1983.

II. THE CIRCUITS ARE NOT IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT, NOR ARE THEY IN CONFLICT WITH EACH OTHER.

Pursuant to Supreme Court Rule 10, a petition for writ of certiorari may also be granted where one circuit has rendered a decision in conflict with the decision of another circuit. S.Ct.R. 10(1)(a). However, once again, the conflict must be a true conflict that can only be effectively resolved by the Supreme Court. Furthermore, the conflict must be one that will be resolved by the particular case before it. Frankfurter and Hart, *The Business of the Supreme Court at October, 1933*, 48 Harv. L. Rev. 238, 268-269 (1934). Thus, conflicts arising from the particular applications of general rules turning upon the analysis of special states of fact, do not support the granting of a petition for writ. *Id.*

A careful review of the twelve circuits' decisions cited by Petitioners indicate that their "conflict" argument arises merely from the differing semantics and factual differences of each, as well as a misinterpretation of *DeShaney*. 489 U.S. 189. For example, several circuits utilize the language "special relationship" in order to determine whether an affirmative duty existed under the Due Process Clause, while other circuits cite to "custodial" relationships and still others cite to "special circumstances." However a close look at each case indicates that the circuits are not in conflict on the teachings of *DeShaney, i.e.* that in *"certain limited circumstances,"* where the state has through its actions so restrained the freedom of an individual that he cannot protect himself *or* has

created the danger or rendered the individual more vulnerable to the danger, the Due Process Clause places a duty on the state to protect the individual from outside dangers. 489 U.S. at 198, 201 (emphasis added).

In addition, while this case by case examination proves some courts rely on a "relationship" analysis to determine liability and others rely on a "creation of danger" analysis, such does not prove a conflict exists. The analysis utilized and result reached by a court in a particular case is entirely dependent upon the particular facts and nature of the claims asserted. Hence, the fact that one circuit utilized a "relationship" analysis, another a "creation of danger" analysis, and yet another both standards, is explained by the factual inconsistencies in the compared cases, not by a conflict in the circuits.

Furthermore, *DeShaney* espouses several rules on Due Process liability, *i.e.* 1) the general rule of no duty; 2) the exception where the state has itself deprived the citizen of liberty; and 3) that liability may exist where the state created the danger. Thus, it is not a conflict for a circuit to utilize one teaching of *DeShaney*, rather than another, where the facts/claims asserted call for such.

SIXTH CIRCUIT

The Court of Appeal's decision in the instant case is not in conflict with the other circuits.

First, like the other circuit decisions since *DeShaney*, the Sixth Circuit found that in "certain limited circumstances", ones that might be called "special relationships", the state has an affirmative duty to protect or prevent third party violence. (See Petitioners' Appendix A, pp. 9a-10a, p. 10a, n.4).

Second, like other circuits, the court also adhered to the ultimate teachings of *DeShaney* on "creation of danger". Petitioners had argued to the Sixth Circuit that Respondent itself had "caused" the auto accident between Petitioner and the epileptic driver. The Court in dicta noted that, unlike in *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987), the Respondent had not done anything to create or cause the danger faced by Jones. (See Petitioners' Appendix A, p. 11a); *cf.*, 489 U.S. at 201.

Third, while decided prior to *DeShaney*, Respondent respectfully asserts that even the Sixth Circuit's earlier decisions of *Janan v. Trammell*, 785 F.2d 557 (6th Cir. 1986) and *Nishiyama* are consistent in result with *DeShaney*, and the other circuits. In *Janan*, the state parole board had done nothing to create the particular danger faced by the victim when he was murdered by a parolee. *Accord*, 489 U.S. at 201. Nor was there any evidence that the state parole board had restrained the victim's freedom through custody or other means. *Accord*, 489 U.S. at 199-200. Yet in *Nishiyama* there was evidence that the Dickson County police had itself created the danger faced by the victim in providing its prisoner with a fully equipped patrol car. *Accord, Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1784 (1990); *cf.*, 489 U.S. at 201 (where victim acknowledged state had

done nothing to create danger, and evidence was in accord.)

D.C. CIRCUIT

Harris v. District of Columbia, 932 F.2d 10 (D.C. Cir. 1991) involved an individual who was placed in police custody after overdosing on PCP, and who later died following and/or during such custody. In examining the limited issue of whether the arresting officers were entitled to qualified immunity, the court of appeals specifically reviewed the teachings of this Court in *DeShaney*, i.e. whether the officers assumed a duty from the limitations which they imposed on Harris in arresting him. There was no need, however, to address a "creation of danger" theory as the Plaintiff had not asserted such a theory, nor had the evidence indicated the officers had "created the danger", for example, by giving Harris the PCP he overdosed on. *Accord, Black by Black v. Indiana Area School Dist.*, 985 F.2d 707 (3rd Cir. 1993).

FIRST CIRCUIT

Monahan v. Dorchester Counseling Center, 961 F.2d 987 (1st Cir. 1992), arose when a voluntarily committed mental patient jumped from a public mental facility's van and was struck by another auto. Once again, this court of appeals turned directly to the teachings of *DeShaney* and this Court's earlier decision of *Youngberg v. Romeo*, 457 U.S. 307 (1982), to determine if these circumstances gave rise to a relationship between the state and the victim,

whereby the state assumed a duty. *Accord, D.R. v. Middle Bucks Vo. Tech. School*, 972 F.2d 1364. In addition, because Monahan specifically argued that "the [state] created, or at least rendered him more vulnerable to a danger," the appellate court also examined this analysis. 961 F.2d at 992-93.

SECOND CIRCUIT

Alternatively, *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993) did not look to the custodial or special relationship analysis, but jumped directly to the issue of creation of danger. However, the analytical approach used by this court was *not* due to some "conflict" among circuits, but rather arose from the particular facts and claims of that case. *Id.* at 99. *Accord, Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990). In *Dwares*, the plaintiffs were demonstrators who were beaten by skin-heads while attending a rally in Washington Square Park. The attack occurred in the presence of defendant police officers and the plaintiff alleged that the officers specifically "conspired" with, and directly "aided and abetted in," the skin-heads attack. *Id.* Thus, the court was not called upon to address a "custodial" or "special relationship" theory, but was instead required to turn to the "creation of danger" teachings of *DeShaney*. Furthermore, this is the only case cited by Petitioners that dealt with an unusual "conspiracy" claim and this in itself would lead to a slightly different treatment than that given in cases where no such facts/claims exist.

THIRD CIRCUIT

Similar to *Monahan, Brown v. Grabowski*, 922 F.2d 1097 (3rd Cir. 1991), *cert. denied*, 111 S.Ct. 2827 (1991), a domestic violence case, dealt with claims that the state had a "custodial relationship" and in the alternative that the state "created the danger." *Id.* at 1114-1116. It is specifically noted that although this court of appeals may have utilized the language "custodial" rather than "special relationship," the court's analysis is the same as that used by this Court in *DeShaney* and other circuits, *i.e.* that the state did not restrain the freedom of the victim to act on her own. *Id.* at 1115-1116.

Similarly, in *D.R. v. Middle Bucks Area Vo. Tech. School*, a case involving students who were molested by other students during school hours, the plaintiffs asserted both "special relationship" and "creation of danger" arguments. 972 F.2d 1364. Accordingly, the court of appeals was called upon to address both claims, and in citing *DeShaney*, followed the analysis first of whether attendance at school amounted to a "restraint on personal liberty" and second, whether the state did anything to create plaintiffs' danger or render them more vulnerable. *Id.* at 1369-1368, 1373-1375; *cf., Black by Black*, 985 F.2d 707 (where court only examined "special relationship" analysis because plaintiff did not assert, nor did facts indicate, "creation of danger" issue).

FOURTH CIRCUIT

In *Piechowitz v. U.S.*, 885 F.2d 1207 (4th Cir. 1989) the survivors of witness in criminal trial sued government

officials alleging the officials failed to prevent their relative's murder by a contract killer. Because the facts did not indicate that defendants had acted to restrain the decedents' liberty and freedom to protect themselves, the court citing *DeShaney*, affirmed summary judgment on behalf of the defendants. *Id.* at 1214-1213. The court did not address a "creation of danger" analysis because the plaintiffs did not make such a claim, nor was there any supporting evidence of such a claim.

FIFTH CIRCUIT

McKee v. City of Rockwall, Tex., 877 F.2d 409 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 727 (1990) dealt with another unfortunate domestic violence victim who was injured when police ignored her request that her husband be arrested. Respondent seriously questions this case's application to the "conflict" analysis on review. *McKee* arose not from a due process "failure to protect" or "creation of danger" claim, but rather from the assertion that the officers discriminated against McKee because of her gender, *i.e.* violation of equal protection. 877 F.2d at 413. However, it is noted that the court of appeals did look to *DeShaney* for assistance in determining whether a duty to arrest did exist and its analysis was no different from the other circuits in examining the relationship between the victim and the state. Further, the lack of a more detailed "custodial relationship" analysis is arguably due only to the lack of special relationship or custodial facts.

In addition, while *Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1066 (1993), a school molestation case, gives the appearance of being in conflict with other circuits that have found school attendance does not give rise to a duty to protect, the apparent inconsistency is irrelevant to the instant case. In *Doe*, a young girl was repeatedly exposed to sexual advances and contact by a high school teacher. Though the school officials were repeatedly warned, the school took no action. Relying on *DeShaney*, and the *specific facts presented* in *Doe*, the Court of Appeals found that the school, by its abhorrent actions, had essentially taken Jane Doe into its custody and restrained her freedom to protect herself.

Thus, *Doe* is not in conflict with the other circuits because *Doe* turned on facts particular only to that case. Moreover, it is well-established that writ of certiorari should not be granted where the alleged conflict would not be corrected in the case on review. As the instant case does not deal with when school attendance creates a "custodial relationship," any conflict on this issue will not be remedied. *See* 489 U.S. at 201, n.9.

In *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992) the court examined both the "special relationship/restraint on freedom" and the "creation of danger" issues in finding that the estate of a hostage victim killed by gunman during confrontation had not asserted a constitutional claim against the sheriff. *Id.* at 308-309. This is the same analysis utilized in *DeShaney* and relied upon by the other circuits when the appropriate facts/claims are present.

489 U.S. at 199-201. *Accord*, 961 F.2d at 992-993; 922 F.2d at 1114-1116.

SEVENTH CIRCUIT

Petitioners assert that the Seventh Circuit does not utilize a relationship analysis when appropriate. This is simply incorrect.

While the court in *Gibson*, did not rely on a custodial or special relationship analysis, this was due only to the fact that plaintiff's claims sprang from a "creation of danger" or "causation" argument. 910 F.2d at 1519-1523, 1521, n.19. Plaintiff made no claim of, nor was there evidence to support, a "relationship" that gave rise to a duty to protect. Moreover, it is important to note, that unlike the facts in the instant case, evidence existed to indicate the state had "created the danger," in that it had trained and *armed* the defendant officer who shot the plaintiff. *Accord, Cornelius*, 880 F.2d 348.

Alternatively, in *Salazar v. City of Chicago*, 940 F.2d 233 (7th Cir. 1991), *Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283 (7th Cir. 1991) and *K. H. through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) the Seventh Circuit *did* utilize a "special relationship/custodial" analysis, rather than a "creation of danger" because the particular facts/claims in those cases required it. 940 F.2d at 237 (Salazar was a pre-trial detainee in the custody of the defendants); 930 F.2d at 1284 (plaintiff alleged that by being a housing authority resident, he was in "custody" of the defendants); 914 F.2d at 848-849 (where state assumed "custody" of K.H. by removing her from her

parents' custody and placing her in state foster care). *Accord, Norfleet v. Arkansas Dept. of Human Services*, 989 F.2d 289 (8th Cir. 1993); *See also, Losinski v. County of Trempealeau*, 946 F.2d 544 (7th Cir. 1991). The key again to all three cases is not, as Petitioners argue, that the state knew the foster homes to be abusive or were concerned about the excesses of governmental power, but rather whether the state actors so restrained the plaintiff that he/she could not act on his/her own. (See Petition for Writ of Certiorari, p.19).

EIGHTH CIRCUIT

In *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1265 (1993) the Eighth Circuit, relying heavily on *DeShaney*, analyzed both whether a relationship existed between the victim and the defendants such that the victim's freedom to act was restrained and whether the state through its actions created plaintiff's predicament. *Accord*, 980 F.2d 299; 972 F.2d 1364.

NINTH CIRCUIT

Like *Gibson*, the court in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) found liability where an officer stranded passengers after detaining driver. Once again the officer had interfered with the plaintiff's freedom, placing her in a position of vulnerability she would not have been in had he not acted at all. *Id.* at 590; *Accord, L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*,

113 S.Ct. 2442 (1993) (where court, relying on *DeShaney's* special relationship exception and danger creation exception held facts gave rise to liability because although plaintiff was not in custody and therefore, no relationship existed, the state created the danger).

Alternatively, in *Balistreri v. Pacifica Police Department*, 901 F.2d 696 (9th Cir. 1990), the Ninth Circuit looked only to the "relationship" analysis in finding the state did not assume an affirmative duty to protect the domestic violence victim. The court was not asked by the plaintiff, nor called upon by the facts, to look beyond this issue – no evidence or claim existed that the state itself created the danger.

TENTH CIRCUIT

Petitioner asserts the Tenth Circuit's decision of *Hilliard v. City and County of Denver*, 930 F.2d 1516 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 656 (1991) is inconsistent with *Wood*. 879 F.2d 583. However, unlike *Wood*, *Hilliard* only dealt with the *limited* issue of whether in *1988*, prior to *DeShaney*, the law was clearly established that the defendant police had an affirmative constitutional duty to protect passenger of automobile from danger when car was impounded. 930 F.2d at 1520. Accordingly, it is impossible to state that the Tenth Circuit is in conflict with the Ninth Circuit, when this circuit has not ruled on the particular factual issue presented in *Wood*.

Alternatively, in *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1266 (1993) the Tenth Circuit did address the "custodial relationship" issue

when it was presented with facts calling for such an analysis. Consistent with all other circuits, except perhaps the Fifth, the court found that attendance at school did not amount to restraint of freedom to act.[2] However, once again the court was not called upon and therefore did not discuss "creation of danger."

ELEVENTH CIRCUIT

Finally, in *Cornelius*, the Eleventh Circuit relied on *DeShaney* to find that the victim's danger, *i.e.*, attack by an inmate on work release, had been created by the town officials, in that they brought the prisoner to city hall and provided him with his weapon, a knife. 880 F.2d at 356. *Accord*, 910 F.2d 1510. Furthermore, the court, under the facts presented found that a custodial or special relationship existed because the plaintiff as an employee required to work at the same location as the third party criminal. *Id.* at 356-357.

In summary, it is clear that while a superficial examination of the circuits may indicate that a conflict exists, a thorough review of each case, including the facts asserted and the analysis utilized by the appellate courts, unequivocally indicates that no conflict exists with regard to the issue on review.

[2] As noted previously, this conflict is not relevant to the case on review and would not be corrected if certiorari were granted. 489 U.S. at 201, n.9.

CONCLUSION

The Sixth Circuit decision is entirely consistent in both legal theory and result with the precedent of this Court. In addition, the Sixth Circuit decision in this case is not in conflict with any other circuit concerning the issue on review. This Court has spoken at great length regarding the issue on review, and the legal theories developed by this Court have been appropriately applied given the facts in this case. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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